New England Confectionary Company *and* Bakery, Confectionary, Tobacco Workers & Grain Millers International Union, Local 348 and Jose E. Pinto, Intervenor. Cases 1–CA-45240 and 1–CA–45404

December 30, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

On January 29, 2010, Administrative Law Judge Ira Sandron issued the attached decision. The General Counsel filed exceptions and a supporting brief as well as a brief in support of the remainder of the Administrative law judge's decision. The Charging Party filed exceptions and a supporting brief. The Respondent filed limited cross-exceptions, a supporting brief, and an answering brief to the General Counsel's and Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, New England Confectionary Company, Revere, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its Revere, Massachusetts facility copies of the attached notice marked "Appendix"[43] in English, Spanish, Portuguese, Cape Verdean Portuguese, and Haitian Creole. Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 4, 2009."

[1] The General Counsel and the Charging Party have implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's dismissal of the allegation that the Respondent assisted a decertification effort by conveying to employees that it authorized employee Benilde DaCosta's activities in support of that effort.

[2] We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

Emily Goldman and *Kevin J. Murphy, Esqs.,* for the General Counsel.

Jay M. Presser, Esq. (Skoler, Abbott & Presser, P.C.), of Springfield, Massachusetts, for the Respondent.

Anne R. Sills, Esq. (Segal, Roitman & Coleman, LLP), of Boston, Massachusetts, for the Charging Party.

Timothy C. Cavazza (Little Medeiros Kinder Bulman & Whitney PC), of Providence, Rhode Island, for the Intervener.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter arises out of a consolidated complaint and notice of hearing issued on July 31, 2009,[1] against New England Confectionary Company (NECCO or the Respondent), stemming from charges filed by the Bakery, Confectionary, Tobacco Workers & Grain Millers International Union, Local 348 (the Union). The complaint, as amended at trial, alleges violations of Section 8(a)(1) of the National Labor Relations Act (the Act) in connection with the decertification petitions that the Intervener filed on February 27 and May 7.

Pursuant to notice, I conducted a trial in Boston, Massachusetts, on October 19–23, 2009, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and the Respondent filed helpful posthearing briefs that I have duly considered.

Issues

1. Did Human Relations (HR) Generalist Numen Larreynaga, during the period from about February 2 to May 7, solicit Donatila Martinez, Santos Ramos, and Francisco Rodriguez to sign a petition for the decertification of the Union?

[1] All dates occurred in 2009, unless otherwise specified.

2. In conjunction with that activity, did she, in about February, promise Martinez, Ramos, and Carolyn DeGraffenreid improved benefits if they rejected the Union?

3. Did Larreynaga, in about late September or early October, attempt to interfere with and coerce Martinez with regard to her testimony at the upcoming trial?

4. If Larreynaga engaged in the conduct alleged in the above paragraphs, were her actions imputable to the Respondent on the theory of apparent agency? The General Counsel does not assert that she was a statutory supervisor under Section 2(11), or an agent under Section 2(9), or possessed actual authority.

5. Did the Respondent, between about February 2 and May 7, provide unlawful assistance in connection with the decertification of the Union by permitting Benilde DaCosta (B. DaCosta) to solicit signatures on decertification petitions during worktime, in violation of company policy? More specifically, did the Respondent, through Manny DaCosta, DaCosta's husband and, at all times relevant, plant manager or facilities manager (DaCosta), allow her to solicit employees to sign such on her or their worktime? The General Counsel does not allege any disparate application of the Respondent's no-solicitation policy.

6. Did DaCosta, on about May 4, promise Juan Figueroa higher wages if the Union was decertified?

The General Counsel avers that the above conduct tainted the May 7 petition, which the Region conditionally dismissed pending the outcome of this proceeding. However, although the ultimate decision on these charges undoubtedly will affect the disposition of the petition, the representation case was not consolidated with this proceeding and is not per se before me.

Witnesses and Credibility

The General Counsel called Larreynaga; Figueroa, the Union's chief steward; DeGraffenreid, a union steward; employees B. DaCosta, Martinez, Ramos, and Rodriguez; and Thomas Riley, HR manager, as an adverse witness under Section 611(c).

The Respondent questioned Riley as its own witness and called DaCosta. The Intervener's counsel called Intervener Jose Pinto.

As to credibility, I start by stating that I find Riley and Larreynaga to have been less than forthright, and both seemingly tried to downplay Larreynaga's authority and role. I therefore generally do not credit them where their testimony conflicted with other witnesses or was inconsistent with documentary evidence.

The integrity of testimony is one of the cornerstones of a formal legal proceeding such as this. Significantly, Riley flagrantly disregarded my sequestration instruction by talking to Larreynaga about his testimony during a break, misconduct exacerbated by his subsequent contradictory testimony regarding the subjects they discussed. He first admitted that he had talked to her "briefly" to refresh his recollection of the date a document was prepared.[2] The following questions and answers ensued:[3]

> GC: Were any other matters discussed with Ms. Larreynaga during the break that relate to any possible testimony in this proceeding?
>
> A: No.
>
> . . . .
>
> GC: Isn't it true also that you discussed with Ms. Larreynaga the date that Stephanie Lim began working for the company?
>
> A: I did mention that I felt foolish, I couldn't remember Stephanie's hiring date.

Possibly, he discussed other matters with her as well and, inasmuch as she had not yet been called as a witness, he may have influenced her testimony. In any event, I have to conclude that he did not appreciate the importance and seriousness of his obligation to tell the truth under oath, unassisted, and to avoid potentially "tipping off" another witness as to what she should say to be in accord with him. Accordingly, I question the integrity and reliability of his testimony.

Other factors lead me to the same conclusion. Riley is the highest-level HR representative in the HR office. He handles personnel matters for nearly 450 or so employees and, by his own testimony, is involved in communications with management, union representatives, and employees on a regular basis. Yet, his demeanor reflected marked discomfort, he exhibited noticeable defensiveness throughout his testimony, and portions of his testimony were almost incoherent, such as when job descriptions for Larreynaga and HR Coordinator Stephanie Lim were prepared vis-à-vis the date the first decertification petition was filed.

Further, Riley first testified that the hiring season starts in about June and ends in August or September, but he later testified that "very little hiring" was done between June 2008, and March 2009,[4] in an apparent effort to minimize Larreynaga's involvement in the orientation of new employees.

In addition, his testimony that in January, "an onslaught" of employees came into HR and complained to Larreynaga about union dues and that "Numie was beside herself"[5] struck me as exaggerated, and Larreynaga, herself, made no such assertion.

For a myriad of reasons, Larreynaga was also an incredible witness. I start with her testimony that even though the Respondent's counsel read to her her *Johnnie's Poultry* rights[6] and had her sign an acknowledgement he had done so,[7] he asked her no questions whatsoever. In this regard, Attorney Presser stated therein, inter alia:

> In order to properly prepare the Company's defense to the Complaint, I would like to ask you questions concerning allegations contained in it. . . .
>
> I am advising you that all of my questions are designed to discover facts which may be used in trial . . . in defense of the charges.

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[2] Tr. 701.

[3] Id., Tr. 704.

[4] Tr. 594, 606.

[5] Tr. 677, 681.

[6] See 146 NLRB 770 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965).

[7] GC Exh. 15, dated October 6.

In her acknowledgment, Larreynaga stated, in part:

> I spoke to him voluntary and he told me before he began that I didn't have to answer any of his questions. . . .

Thus, her testimony was inconsistent with the document on its face, undermining my confidence in her veracity as a witness.[8]

That aside, as with Riley, I need not rely solely a single flaw in finding Larreynaga unreliable. Her answers were frequently nonresponsive, evasive and/or contradictory, and she often added gratuitous comments that appeared designed to minimize her authority and role in the HR office. I will set out only a few of many examples. In general, she seemed to attempt to formulate her answers rather than respond spontaneously. In making this negative credibility assessment, I take into account that Larreynaga has worked in the human relations field for many years—indeed, decades—and by her own testimony has a great deal of experience answering employees' questions on a number of subjects. Thus, her frequent failure to answer questions in a straightforward, responsive manner is rendered more suspicious. I also note that her accounts of incidents with employees Martinez and Ramos concerning the decertification petitions lacked detail and sounded incomplete.

Larreynaga's initial testimony, about her resume (R. Exh. 1), raised doubts about her credibility. She denied portions thereof regarding her job titles and job duties for prior employers, could not remember when she prepared the resume, and stated that it was not prepared for any specific purpose but that "I always wanted to have a resume."[9]

Riley testified that Larreynaga sometimes conducts new employee orientation on her own and without him, when he is out of the office or on vacation. Contradicting him, Larreynaga testified that she has never done orientation on her own when Riley is not available.

Larreynaga's testimony about her role during orientations was contradictory and evasive, as reflected by her testimony regarding the orientation checklist (ALJ Exh. 1). She first testified that Riley or Lim are the ones who make checkoffs, and "I only follow the instructions which they [are] giving," but then answered "no" to the question of whether she takes instructions from Lim during orientations.[10]

Another example of her inconsistent testimony concerned whether employees come to her when they have heard rumors of a layoff. She initially testified that they sometimes do so, and she tells them to talk to their supervisors to determine their seniority for bumping purposes; however, she later testified unequivocally that they never come to her for that reason. Moreover, Larreynaga evaded giving a direct answer to the simple question of whether she or Lim prepares recall letters most of the time.[11]

[8] Attorney Presser did not testify on the matter, and I cannot treat as exculpatory evidence what he states at R. Br. 41 fn. 47. To do so would defeat a fundamental purpose of an evidentiary hearing to afford all parties the opportunity to examine and cross-examine witnesses under oath.

[9] Tr. 790.

[10] Tr. 868–869.

[11] See Tr. 821–822.

Larreynaga's testimony regarding how often she has to interpret or translate for Spanish-speaking employees was hopelessly confusing and contradictory, in a seeming effort to minimize the extensiveness of such activity. Although she testified that 198 employees out of the 395 listed in Charging Party's Exhibit 1 are Spanish speaking,[12] she also testified as follows:[13]

> GC: Of the three to four employees who come to you on average every day with questions, how many are Spanish-speaking?
>
> A: Probably none.

Larreynaga subsequently testified that three or four Spanish-speaking employees come to her with questions each week and then that the percentage of employees who come to her with questions who are Spanish speaking is 4 percent.

The following well illustrates her nonresponsiveness/evasiveness in answering questions.[14]

> GC: For how long has [Lim] participated in new employee orientations?
>
> A: Not every day are new persons received from work.
>
> JUDGE: When did she start attending orientations?
>
> A: When she was given some training to start to do these orientations, that the person who gave her the training, his name is Edward Falconer.

Larreynaga's testimony that DeGraffenreid was screaming at Riley in the HR office regarding the first decertification petition sounded exaggerated and does not gibe with Riley's testimony that DeGraffenreid merely asked him what was going on.

I find it unnecessary to detail inconsistencies between Larreynaga's affidavits (which were taken in Spanish and then translated) and her testimony, or evaluate the credibility of her testimony that she found many errors in her affidavits but took no steps to notify the Region of any of them. Suffice to say, I need not rely on them to conclude that Larreynaga was an incredible witness.

Figueroa seemed candid, and his testimony on the substance of key conversations was consistent and did not strike me as embellished or exaggerated. I therefore find him a credible witness. On the other hand, DeGraffenreid appeared markedly ill at ease, reticient, and defensive throughout her testimony, as though she was reluctant to testify. For this and other reasons to be stated, I do not credit her account of what Larreynaga told her on February 19 or 26.

Other witnesses of the General Counsel and NECCO appeared credible, and nothing in the record suggests they were untruthful. Although B. DaCosta appeared nervous, she seemed candid, and her testimony was either corroborated or not contradicted by any other witnesses. Accordingly, I generally credit her testimony. Martinez is illiterate not only in English but in her native language of Spanish, and I take this into account in assessing her testimony, particularly her inconsistencies with regard to the specifics of what occurred in Lar-

[12] Tr. 898–899.

[13] Tr. 906.

[14] Tr. 871.

reynaga's office on about September 21, when Martinez signed a decertification petition. I also note that Martinez' general description of what Larreynaga did and said that day comported with the testimony of Ramos and Rodriguez, whose credibility I have no reason to doubt. The versions of all three were similar but not identical, leading me to conclude that they were based on genuine recall and not a script, and I do not believe that all of them wholly fabricated their testimony solely for the sheer motive of creating employer taint of the petition process. In making this determination, I also repeat my conclusion that Larreynaga was not a candid witness.

Finally, on the subject of credibility, I cite the well-established precept that "'[N]othing is more common in all kinds of judicial decisions than to believe some and not all' of a witness' testimony." *Jerry Ryce Builders,* 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). The trier of fact must consider the plausibility of a witness' testimony and appropriately weigh it with the evidence as a whole. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 798–799 (1970).

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, and stipulations, as well as the thoughtful posttrial briefs that the General Counsel and the Respondent filed, I find the following.

The Respondent, a corporation with an office and place of business in Revere, Massachusetts (the facility), has been engaged in the operation of a factory that manufactures confectionary candy, either sugar or chocolate based. The Respondent has admitted jurisdiction as alleged in the complaint, and I so find.

Since at least 1958, the Union has represented employees in a bargaining unit comprised of all full-time and regular part-time production employees, including sanitation, shipping/receiving, print shop, uniform attendant, lead trainers, and lead persons.

NECCO operated out of a facility in Cambridge, Massachusetts, for many years prior to its relocation to Revere, Massachusetts, in 2003. In 1994, NECCO acquired Borden Candy Products, which it renamed Haviland Candy (Haviland). Haviland employees were not represented by a union until 2003, when they were relocated to the new facility in Revere and incorporated into the existing bargaining unit.

NECCO and the Union were parties to a collective-bargaining agreement that commenced on May 1, 2006, and expired on April 30. In December 2007, the parties agreed to certain modifications to the collective-bargaining agreement. On August 29, the parties reached agreement on the current contract, effective from May 1 until April 30, 2012.

Wayne Matthews is the Union's business agent who services the bargaining unit. He comes to the facility, including HR, regularly on Thursdays. When he is there, Larreynaga translates for him on a regular basis. Figueroa is the chief shop steward, and DeGraffenreid is one of four shop stewards.

On February 27, Pinto, who had been at Haviland, filed a decertification petition in Case 1–RD–2124.[15] At all times at NECCO, Pinto has been lead person in Department 69.

On March 12, the Region dismissed the petition because of an insufficient showing of interest.[16] Pinto filed a second decertification petition, on May 7.[17] By letter of August 10, the Region conditionally dismissed it based on employer taint, as averred in allegations in the instant complaint, subject to reinstatement after their final disposition.[18]

The Respondent's work is seasonal in nature, with the busiest period from approximately November until February. It has about 20 production departments. The number of production employees averages approximately 375 on an annual basis (excluding temporary hires). At the end of the busy season, more than 200 production employees may be temporarily laid off. The hiring season starts in about June and ends in August or September. There are about 75 salaried employees, exempt and nonexempt, whose number is fairly constant throughout the year.

A majority of production employees do not have English as their first language. The largest such group speaks Spanish, perhaps 50 percent of the total number of production employees,[19] while substantial numbers of others speak Haitian Creole, Portuguese, or Cape Verdean Portuguese. The precise number of Spanish-speaking employees who are not able to communicate effectively in English is indeterminable; however, clearly, at least some require the use of an interpreter.

Joint Exhibit 6 is a diagram showing the layout of the first floor, where the HR offices, the laundry room, and the cafeteria are situated. The corporate offices and several production departments are located in separate areas on the second floor.[20]

HR

The head of HR is Vice President Tony Breitti, whose office is in the corporate offices upstairs. Riley, Larreynaga, and HR Coordinator Stephanie Lim have individual offices in the HR office on the first floor. Larreynaga's officer is smaller than Riley's or Lim's. The safety office is also located in HR.

HR has two entrances, one from the parking lot area and the other from the cafeteria. From the parking lot entrance, persons enter a small vestibule that leads to the HR offices proper. Larreynaga's office has a large glass window overlooking this vestibule, and she can "buzz" people in. She can also slide it open in order to receive or to give documents, such as applications for employment or paychecks.

As previously stated, Larreynaga and Riley were not fully credible witnesses. Therefore, I base my facts on their testimony only to the extent that it was consistent with more reliable witnesses and trustworthy documents of record.

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[15] Jt. Exh. 1.

[16] Jt. Exh. 3.

[17] Jt. Exh. 2.

[18] Jt. Exh. 4.

[19] Larreynaga testified that 198 of the 395 production employees listed in the Company's January 16 report to the Union (CP Exh. 1) are Spanish speaking. Tr. 898–899.

[20] Department 69 operates on both floors, and Pinto has occasion to work on each.

Larreynaga has been a NECCO employee since the 1994 merger, longer than either Riley or Lim. She is a nonexempt salaried employee who is not in the unit. Eligible for overtime pay, she swipes her timecard electronically at the same entrance that unit employees use; exempt employees use a different entrance. From El Salvador, she is the only person in HR proficient in Spanish; neither Riley nor Lim (or Lim's predecessors in the same position) can converse in Spanish. She also can limitedly communicate in Portuguese. Larreynaga is the primary contact in HR for many of the Respondent's Spanish-speaking employees, and Riley and Lim sometimes use her to translate when they are conversing with them. If she is not there, they use Spanish-speaking supervisors in her place. For a significant part of the day, Riley is away from the HR office.

Production employees are paid each Friday. If they are on layoff status or otherwise not working that day of the week, they pick up their paychecks from Larreynaga, who keeps them in a file cabinet in her office; she opens the window overlooking the vestibule and gives them the paychecks, for which they sign. Employees who are working receive paychecks from their supervisors.

Supervisors notify employees when they are going to be laid off. The employees go to Larreynaga's office for applications for unemployment insurance and for remitting $2 to the Union to waive their monthly dues during the period they are in layoff status.

General Counsel's Exhibit 8 is representative of the types of letters that Larreynaga issues as an HR representative. Along with credited testimony, I find that they establish the following.

When employees are called back to work, Larreynaga normally notifies them. She also notifies them when they need to provide proof of employment authorization or to pay medical insurance premiums.

Larreynaga has provided "To Whom It May Concern" letters to former and current employees, confirming their employment for NECCO; in some, she has made favorable comments about the employee's performance. She also has written letters to the immigration authorities, with positive remarks about the employee.[21]

Based on the Respondent's Exhibit 1, testimony of Larreynaga that was consistent with it, and credited testimony of other witnesses, I find that Larreynaga's duties include the following:

Answer telephones.

Annual OSHA hearing tests, etc.

Assist in payroll by inputting union and other information, etc.

Produce and deliver layoff letters, housing, etc.

Help employees with long and short term insurance claims, etc.

Transit cards, AAP reports, parking spots, etc.

Process weekly payroll reports, 401K, Metro Credit Union.

Translate for Spanish when needed.

Keep office calendar for memos, holidays.

Medical insurance, FLMLA, Cobra, Delta Dental.

Riley explained that Larreynaga, on her, own handles most of the medical and dental benefits, Lim the life and disability insurance, but that they can fill in for each, with he performing their work if necessary. He also testified that Larreynaga has "special projects," such as monitoring affirmative action, preparing reference and recall letters, typing and posting company memoranda, maintaining personnel files, sending employees for preemployment physicals and drugs screens, and performing administrative clerical work.

Employees come to see Larreynaga in HR on a daily basis, for a variety of reasons, such as to change their address; change 401(k) or credit union deductions from their paychecks; change medical insurance coverage; verify employment for immigration, housing, or other purposes; ask questions about health insurance open enrollment, family leave, or other matters; sign up for posted vacancies; or inquire about a leave of absence. Most of the documents she generates are on templates in the Millennium software program, to which Riley and Lim also have access. In addition, Larreynaga may also answer questions from employees when she is on break in the cafeteria or on the shop floor.

NECCO has approximately 100 new hires each year, all of whom go through an orientation session. As far as Larreynaga's role in the orientation, only she and Riley testified on the subject. Their testimony was not fully consistent. At the very least, at the 3–4-hour orientation sessions, Larreynaga goes over the various topics in Spanish and assists Riley or Lim in distributing, collecting, and copying forms and materials.[22] Orientation covers all facets of employment, including required paperwork, Government and employer requirements and policies, schedule, timeclock, benefits, and miscellaneous. New hires receive numerous documents at orientation. All company documents are solely in English.

Ramos, a Honduran native, has worked for NECCO for about 3 years and is in Department 73. When asked who Larreynaga is, he replied, "Numie is NECCO's secretary."[23] He described her duties as preparing all the paperwork and providing information to employees who have questions. He has never personally gone to her with a question.

Rodriguez, who is from Puerto Rico, has worked for NECCO since mid-1998 and is in Department 77. He testified that Larreynaga "works" in HR.[24] He does not have contact with her in his daily work but goes to her office to ask about vacation time or to pick up a paycheck. In approximately mid-2008, he asked her about the Company's medical insurance. She advised him that the clinic insurance plan he had was cheaper.

Martinez, a Salvadoran native, has worked for the Company since May 1998 and is in Department 75. She met Larreynaga when they both worked at Haviland. She has gone to see Larreynaga many times to get information. When she needed a replacement medical insurance card in August 2008, she obtained one from Larreynaga. She sometimes checks with Lar-

[21] See also GC Exh. 10.

[22] See ALJ Exh. 1; see also GC Exh. 6.

[23] Tr. 398.

[24] Tr. 373; see also Tr. 392.

reynaga to see if there is a forthcoming layoff, and Larreynaga may then check with the supervisor to find out. Martinez also learns of family emergencies from Larreynaga, who comes to her department; if the matter is very important, Martinez' supervisor will give her permission to leave. If a new position is available, Martinez will get the application from Larreynaga and return it to her. On one occasion, in 2008, boxes fell on Martinez as she was working, and Larreynaga acted as her interpreter when she apparently related her injury to Riley. Martinez went to Larreynaga when she wanted to increase her 401(k) plan contribution. Sometimes, Larreynaga helps her to fill out her vacation requests because she needs assistance. Afterward, Martinez submits them to her supervisor, who approves or disapproves them. Martinez brings her documents pertaining to temporary protective status work permit renewals. Finally, Larreynaga has made copies of documents for her, including a copy of a daughter's birth certificate.

Martinez has also used the lead person and other employees on the floor to translate for her, for example, to ask her supervisor for permission for time off to take her son to a medical appointment. Martinez called Larreynaga "a secretary" in her affidavit because she works in the office.

DeGraffenreid, the lead person in Department 75, has been a union shop steward and on the Union's executive board for many years. She used the nomenclature "receptionist" when referring to Larreynaga and said that the latter "works" in HR.[25] When employees come to DeGraffenreid as a steward about matters such as pay or vacation, she speaks with their supervisors; if their concerns are not resolved, she either goes to see Riley or directs them to see him.

Figueroa, the lead person in Department 73, is also on the Union's executive board. He has been a steward on and off for 5 years and the chief shop steward for about a year. In these capacities, he has not sent employees to talk to Larreynaga or had dealings with her.

Supervisors are the ones who initiate disciplinary actions and tell the subject employees. Normally, the first step of the grievance procedure is between the employee and his or her steward, and the first-line supervisor. If unresolved at that level, Figueroa as chief steward takes it up to Riley, whom he described as the "head" of HR, not to Larreynaga.[26] When HR is involved at the second step, Riley will use Larreynaga to translate, if necessary. This occurs about 10 times a year. On matters of enforcement of the union contract, Figueroa deals with Tony Breitti or Riley, not with Larreynaga.

Figueroa was uncertain of Larreynaga's exact title. When he has had issues pertaining to his own employment, he has gone to either her, Riley, or Lim. Thus, when he recently lost a check another employee had given him, he went to see Lim. He recalled three occasions when he went to see Larreynaga: about 3 years ago, to enroll in the Company's medical insurance plan; about 2 years ago, to cancel that coverage; and about a year ago, to find out his available vacation time and to request 3 months' off. As to the last occasion, Larreynaga stated that she did not know if he could get that amount of leave. He subsequently talked with Riley and DaCosta, who approved his request. His understanding is that many non-English-speaking employees go directly to Larreynaga and that if she cannot take care of the matter, she goes with the employee to see Riley.

At management meetings held with production employees, the Company uses managers or supervisors to translate from English into the four languages previously referenced. Larreynaga does not perform this role. About half of the supervisors are sufficiently fluent in Spanish to communicate fully with Spanish-speaking employees.

Larreynaga's Solicitation and Promises of Benefits

On about February 27, Ramos' supervisor notified him and almost everyone else in Department 73 that they were going to be laid off. Ramos later went to Larreynaga's office to complete the necessary layoff paperwork. When she gave him the unemployment papers, she told him that "[T]here was a list there for the people that wanted the union to leave the company, they could sign it. . . ."[27] She further stated that it was his choice whether to sign but that the Union was not doing anything but charging money and that the Company had benefits which employees were not getting because the Union was there. Ramos replied that he could not sign anything because he was already laid off.

On the afternoon of about February 25, Rodriguez was in the cafeteria, when Larreynaga asked him to accompany her to her office. He did so. Once there, she showed him a paper[28] that was on the desk and asked if he would sign it to get the Union out of the factory, saying that the union contract had expired in December 2007, and that employees were paying for the Union but did not get any benefits. He did so. Knowing little English, he did not read the document. Someone later added his printed name and the date.

In February, Martinez was in the cafeteria prior to the start of her shift at 3:30 p.m. Larreynaga said that she had a photo of Martinez at the Valentine's Day party at her office. Martinez accompanied her. Martinez' testimony about two other employees there and what they and Larreynaga said to each other was confusing and inconsistent with the order of signatures on General Counsel's Exhibit 2. I will therefore disregard that portion of her testimony except as a predicate to her subsequent conversation with Larreynaga.

After the two other employees left, Larreynaga stated to Martinez that they had signed the paper (GC Exh. 2) because they did not want the Union. Martinez asked why not. Larreynaga replied that the Company had better benefits for employees. Martinez asked when she could sign, and Larreynaga replied, whenever she wanted. Martinez signed General Counsel's Exhibit 2. She was not able to read it. Someone later added her printed name and the date.

In about late August, Martinez went to Larreynaga's office to change her 401(k) plan contribution. Before Martinez left, Larreynaga said, "Donna, you've really betrayed me."[29] Martinez replied that she was confused. Larreynaga replied that she

[25] Tr. 197.
[26] Tr. 305.
[27] Tr. 403; see also Tr. 406.
[28] GC Exh. 2.
[29] Tr. 270.

had seen Martinez' signature "popping up all over the place."[30] Martinez responded that she did not know who was telling the truth (presumably about decertifying the Union). This conversation occurred before Martinez received the General Counsel's subpoena ad testificandum, dated September 21.[31]

Following Martinez' receipt thereof, in late September or early October, Lim sent word through Martinez' supervisor for her to go to HR. There, Martinez had a conversation with Larreynaga.

Although Martinez' testimony about whether she brought the subpoena with her then or later on that day was confusing, she was very consistent (but not identical) on direct and redirect regarding what Larreynaga stated in connection with the subpoena. Larreynaga asked Martinez to forgive her for what she had said, that she (Larreynaga) was going to be fired and, given her age, she would not be able to find another job. She added that she was supporting her mother and further stated, "Please say this was something you made up and told Juan [Figueroa], and I'm going to deny everything."[32]

DeGraffenreid testified as follows. On February 19 or 26, she went in HR to speak with Matthews on union matters. He was not there, and she went into Larreynaga's office and asked where he was. Larreynaga answered that he was outside, having a conversation with Riley, and that "[T]he Company wants to get rid of the Union;" DeGraffenreid did not respond, and "[Larreynaga] said to me, they're going to get everybody a bonus, but then she also told me, don't say anything to anyone."[33] DeGraffenreid left Larreynaga's office and went into the HR waiting room area.

Perhaps, there was more to the conversation or its circumstances than DeGraffenreid related that would make the statements she attributed to Larreynaga more plausible. In the absence of such, I deem it highly unlikely that Larreynaga would have sua sponte initiated a conversation about the decertification petition with a union steward and told her straight out that the Company wanted to get rid of the Union and was going to give a bonus. Because of the implausibility of DeGraffenreid's version and her seeming discomfort as a witness, I cannot credit her account.

Figueroa testified about a conversation with Larreynaga at HR in February. It has not been alleged as a violation. He was waiting to see Matthews, and DeGraffenreid was with him and also waiting to see Matthews. Presumably, this occurred on the same day as the above incident to which DeGraffenreid testified.

According to Figueroa, he asked Larreynaga what she thought about the people going around collecting signatures to get rid of the Union. She answered, "[T]here's [sic] a lot of people involved in this, that in fact it's all coming from up there," pointed upward, and said not to tell anyone.[34] Figueroa did not relate how he responded.

[30] Tr. 271.

[31] GC Exh. 3.

[32] Tr. 283; see also Tr. 361.

[33] Tr. 202.

[34] Tr. 60; see also Tr. 167, a very similar but not verbatim reiteration of his earlier testimony.

Larreynaga denied that occurrence of either of the above conversations with Figueroa or DeGraffenreid.

In contrast to DeGraffenreid, Figueroa testified that he (rather casually) initiated his conversation with Larreynaga about the decertification petition and that she hinted or implied that management was behind it. I note in this regard that there are also production areas on the second floor, where Intervener Pinto works part of the time, so that she couched her reference that everything was "coming from up there" in an ambiguity rather than expressly mentioning the Company. I find this plausible, noting that it comports with statements I have found Larreynaga made to other employees and that Figueroa appeared generally believable.

Figueroa and Larreynaga both testified about an incident in the cafeteria in approximately March. Their versions were not necessarily inconsistent. Figueroa's account was more detailed, and he testified that Supervisor Correda was present, yet the Respondent did not call him as a witness. These factors, along with my conclusion that he was a more candid witness, lead me to accept his version, as follows.

In March or so, Figueroa solicited signatures in favor of the Union. When he went to the cafeteria on one morning break, he observed Larreynaga speaking with a lab employee. Figueroa went over. He made the statement that he was upset over what he had to do because "a bunch of stupid people here that want to get rid of the union."[35] He walked away. As he was later preparing food, Larreynaga approached him and asked whom he had called stupid. He denied that he had called her stupid and repeated what he had said before. She replied that she could take him to the office for harassment. Supervisor Correda was present. He called Figueroa over to stop the argument.

The following day, when Figueroa was returning from lunchbreak, Riley asked him to come to his office. After they went there, they had a conversation about the above incident. Figueroa testified that DaCosta was present, but the latter did not testify on the matter. Based on this and my conclusion that Riley was a less reliable witness, I credit Figueroa's account, as follows.

Riley stated that he had heard Figueroa was intimidating people by calling them stupid because they were picking up signatures to get rid of the Union. Figueroa gave his account. Riley then told him okay and to return to work.

B. DaCosta's Solicitation

At all times relevant, NECCO has maintained a solicitation rule that provides, in pertinent part, that employees are not permitted to engage in solicitation while either the employee soliciting or the employee being solicited is on working time.[36] However, management has observed and allowed employees to solicit for Avon sales, lottery tickets, betting pools, collections, and other activities during both their work and nonworktime, and no employees have ever been disciplined for violation of the Company's no-solicitation policy.[37]

[35] Tr. 66–67.

[36] GC Exh. 4.

[37] Uncontroverted testimony of DaCosta, who has been with NECCO for 42 years. Tr. 1043, 1045.

The General Counsel contends that the Respondent, through DaCosta, was aware that B. DaCosta was soliciting during her worktime in violation of company policy, not that her having the decertification petitions in open view in her work area violated normal company policy.[37]

Unit employee B. DaCosta reports to Riley. Entitled "trainer lead," she has worked for NECCO since 1967. Her job duties are to collect and hand out uniforms in the laundry room, which is off the cafeteria, and to clean tables in the cafeteria. She spends the bulk of her time on the former; on the average, she spends 1-1/2 hour's daily cleaning tables.

Government regulations require that everyone in a production area wears a uniform. Normally, each employee receives one clean uniform daily, unless there has been a spill. B. DaCosta gives out approximately 400 uniforms in a typical day, most before the start or finish of the first shift and the beginning of the second shift. Employees can come to her at other times during the day if, for example, they have spilled something on their uniforms. Sometimes they come on breaks, other times on the clock. She separates dirty laundry in different bins, and an outside company picks them up three times a week. She also tags uniforms that need repair, as well as separates and stores clean uniforms.

Normally, she is the sole employee in the laundry room. It has a two-part door into the cafeteria. She sometimes keeps the bottom portion closed and has the top portion open so that she can hand employees clean uniforms through the door; other times, she keeps both open, and employees enter the laundry room for their uniforms.

Her hours are from 6 a.m.–3:30 p.m. She takes a break from 9–9:20 a.m., usually in the cafeteria and with Shop Steward Eliana Ledo. Her lunchbreak is from noon to 12:30 p.m. Most of the time, she spends it in the laundry room, with the door closed. DaCosta joins her for lunch 2 or 3 days a week. Sometimes, he comes to see her when she is either working in the laundry room or cleaning tables in the cafeteria.

On February 24, B. DaCosta was in the cafeteria during her break when unit employee Manny Miranda asked her to sign the first decertification petition. She signed, printed her name, and wrote in the date. She also got a blank page and later made more copies at her home. During the day, she continuously kept the petition on the top of a table in the laundry room, less than a foot from the door. She initially had the page she signed and later put out new blank pages as needed. The petition was in plain sight of employees when they came to pick up clean uniforms, and they could sign it without having to enter the room. Some asked her where the petition was, and she showed them. Between 25 and 50 employees signed, all when B. DaCosta was on her worktime. When she left for the day, she put the petitions in her locker. She gave filled pages back to Miranda.

DaCosta observed the petitions on the table when he came to see her on her lunchbreaks. When he was there, no employees came to her about the petition. He testified without controversion that he never observed any employees solicited to sign a decertification petition, and there is no evidence that he was ever present when employees signed the petitions in the laundry room.

DaCosta's Promise of Benefits

On May 4, at between 6 and 7 a.m., Figueroa was at his workstation and had a conversation with DaCosta. Richie Lovely, a mechanic of a contractor, was present. DaCosta recalled the conversation but conceded that he did not have a full recollection of everything said. Figueroa's account was more detailed and less tentative and seemed unembellished. I therefore credit him and find the following.

Lovely stated that Figueroa was a great guy and a good workman. DaCosta said yes, that he had told Figueroa several times that he was a good worker, "but "unfortunately I cannot pay him no [sic] more . . . because we have a contract with the union. It would be a different story if we didn't have a union."[38] Figueroa replied that he did not want to discuss the subject.

Analysis and Conclusions

Larreynaga's Statements

Section 8(a)(1) is violated when an employer interferes with, restrains, or coerces employees in the exercise of the rights that Section 7 guarantees to them. The standard for determining whether certain conduct violates Section 8(a)(1) is an objective one. *Westwood Health Care Center*, 330 NLRB 935, 940 fn. 17 (2000).

As the Board stated in *Mickeys Linen & Towel Supply*, 349 NLRB 790, 791 (2007), citing *Wire Products Mfg. Co.*, 326 NLRB 625, 640 (1998), enfd. sub nom mem. *NLRB v. R.T. Blankenship & Associates, Inc.,* 210 F.3d 375 (7th Cir. 2000), "It is well settled that an employer violates Section 8(a)(1), by 'actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative.'"

Larreynaga directly solicited employees Martinez, Ramos, and Rodriguez to sign the decertification petition. If committed by an agent of the Respondent, such conduct violated Section 8(a)(1).

As to the allegations concerning Larreynaga's promise of benefits, Larreynaga expressly told Ramos that employees would have better benefits if the Union was not there. She did not directly promise Martinez anything if she signed the decertification petition. However, in telling Martinez that two other employees had signed the petition because the Company had better benefits for employees, Larreynaga conveyed an implied promise of such, which was similarly impermissible. See *E.L.C. Electric, Inc.*, 344 NLRB 1200, 1200–1202 (2005); *County Window Cleaning Co.*, 328 NLRB 190, 196 (1999).

Thus, if Larreynaga was its agent, the Respondent further violated Section 8(a)(1) by promising employees better benefits if they signed the decertification petition.

Finally, I address Larreynaga's statements to Martinez concerning the latter's testimony. In connection with the General Counsel's subpoena ad testifcandum issued to Martinez, Lar-

[37] Uncontroverted testimony of DaCosta, who has been with NECCO for 42 years. Tr. 1043, 1045.

[38] Tr. 84.

reynaga pressured and cajoled her to say at trial that she had made up what she had told the Region during its investigation of the ULP charges herein. In telling Martinez to recant, Larreynaga committed another violation of Section 8(a)(1) if she was an agent of the Respondent. See *Remington Electric*, 317 NLRB 1232, 1232 fn. 2, 1237 (1995).

Larreynaga's Status as an Apparent Agent

Apparent agency is not a simple concept to apply and requires careful analysis, as the following review of the applicable law demonstrates.

According to the Restatement (Third) of Agency § 27:

> Apparent authority . . . results from a manifestation by a principal to a third person that another is his agent. Under this concept, an individual will be held responsible for acts of his agent when he knows or "should know" that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him.

Two conditions must be satisfied: (1) some manifestation by the principal to a third party, and (2) the third party must believe that the extent of authority granted to the agent encompasses the contemplated activity. Id. at Sec. 8; See *Millard Processing Services,* 304 NLRB 770, 771 (1991), enfd. 2 F.3d 258 (8th Cir. 1993), cert denied 510 U.S. 1092 (1994).

As the Board has stated, "An agent has apparent authority to speak for a principal when the principal does something or permits the agent to do something, which reasonably leads another to believe that the agent had the authority he purported to have." *Cablevision Industries,* 283 NLRB 22, 29 (1987); see also *Massey Energy Co.*, 354 NLRB 687, 764 at fn. 11 (2009). The burden of proving an agency relationship is on the party asserting its existence. *Tyson Fresh Meats, Inc.*, 334 NLRB 1335, 1335 (2004); *Millard Processing Services*, above at 772. The determination of whether this burden has been met rests on an analysis of the facts under common law principles. *Ready-Mix, Inc.*, 337 NLRB 1189, 1189 (2002); *Pan-Oston Co.*, 336 NLRB 305, 305 (2001).

The ultimate test is whether, under all the circumstances, employees would reasonably believe that the purported agent spoke for and acted on behalf of company management. *Zimmerman Plumbing Co.*, 325 NLRB 106, 106 (1997); *Great American Products*, 312 NLRB 962, 962 (1993); *Dentech Corp.*, 294 NLRB 924, 925 (1989).

The Board considers the position and duties of the employee in question and the context in which the behavior occurred. *Pan-Oston*, above at 306; *Jules V. Lane*, *D.D.S., P.C.*, 262 NLRB 118, 119 (1982). When an employer places a rank-and-file employee in a position where employees could reasonably believe that the employee spoke on management's behalf, the employer has vested the employee with an apparent authority. *Corrugated Partitions West*, 275 NLRB 894, 900 (1985). Thus, employees who regularly communicate management directives to employees act as agents in furnishing employment related information to employees in the course of his or her regular duties. *Pan-Oston*, ibid. Employees have been found conduits possessing apparent authority where they attended daily production meetings with top management, from which they returned to communicate management's production priorities and were the "links" between employees and upper management. *Hausner Hard-Chrome of KY*, 326 NLRB 426, 428 (1998); see also *Zimmerman Plumbing,* above (apparent authority found when employees attended management meetings and relayed and enforced respondent's decisions); *Ready-Mix,* above at 1189.

The Board may decline to find agency status where an employee acts outside the scope of his or her usual duties. *Pan-Oston*, ibid. Thus, in *Waterbed World*, 286 NLRB 425, 426 (1987), the Board found that an employee who interrogated other employees and threatened their discharges did not act as an agent of the employer because the employer had never held out the employee as being privy to management decisions or as speaking on its behalf.

Although not dispositive, the Board will consider whether the statements or acts of an alleged employer agent were consistent with statements or actions of company representatives. *Pan-Oston*, ibid; *Hausner Hard-Chrome*, supra at 428 (manifestation of apparent authority strengthened when coercive statements of alleged apparent agents echoed statements of admitted agents). Apparent authority may be inferred when an employee acts with the cooperation of or in the presence of supervisors; *Dentech*, supra at 926; *Advanced Mining Group*, 260 NLRB 486, 503–504 (1982). Similarly, an employer's knowledge of, and failure to disavow, the employee's activities also raises the inference of apparent authority. *Haynes Industries*, 232 NLRB 1092, 1099–1100 (1977).

In sum, many factors must be considered and weighed in determining whether Larreynaga had apparent authority. In making this determination, I give most weight to the testimony of the General Counsel's witnesses. I will first address her responsibilities and duties in general and then turn to the circumstances surrounding her specific conversations with employees that would constitute violations of Section 8(a)(1) if she is found to be the Respondent's apparent agent.

Although the General Counsel does not contend that Larreynaga was a manager or supervisor or otherwise an actual agent of the Respondent, employees' perceptions of her authority are key to determining her apparent agency. Significantly, none of the General Counsel's witnesses characterized Larreynaga's position as being managerial, supervisory, or policy-making. Rather, Ramos called her a "secretary"—the term Martinez used for Larreynaga in her affidavit—and described her duties as preparing paperwork and providing information to employees with questions; Rodriguez stated that she "works" in HR; and DeGraffenreid used the nomenclature "receptionist" when referring to her and said that she "works" in HR.

Their nomenclature for Larreynaga was consistent with their testimony and other record evidence about her responsibilities and duties. Clearly, as far as employees' direct contacts with HR, Riley is known to be above Larreynaga (and Lim) in the hierarchy. Indeed, Figueroa and DeGraffenreid deal directly with Riley when it comes to resolving grievances. Supervisors initiate disciplinary actions, not Larreynaga, and she plays no role in grievance processing or in management–union relations in general, other than to translate.

Although Larreynaga answers questions and prepares paperwork concerning vacation and other leave requests, employees must get authorization for leave from their supervisors. Layoffs are based on pre-established standards over which Larreynaga has no discretion. Her communications concerning health and other insurance benefits are merely to relay information about existing benefits. Most of the "To Whom it May Concern" letters she has provided to employees and former employees simply provide basic information such as dates of employment and rates of pay, and in all, she signed her name with the identification of HR or human resources.

The testimony of Riley and Larreynaga was unclear on her precise role in new employee orientations, and the General Counsel offered no evidence thereon. In any event, orientations are very structured, with either Riley, Larreynaga, and/or Lim using a checklist approach, and distributing many documents concerning policies and procedures. Larreynaga does not participate in job interviews that Riley conducts.

Beyond her job duties as such, the issue of her apparent authority largely turns on her status as the only person in HR who is proficient in Spanish and able to communicate effectively with a large number of unit employees by virtue of her bilingual skill. Significantly, supervisors normally translate on the floor for Spanish-speaking employees, and they, not Larreynaga, translate at formal meetings that top management officials hold with employees.

The General Counsel cites a number of decisions in which bilingual employees were found to be apparent agents.[39] However, all of them had additional circumstances that distinguish them from this case. In *Baby Watson Cheesecake*, 309 NLRB 417 (1992), the office employee was an agent in fact in when he told employees to sign authorization cards, and he and a supervisor together told strikers they would be fired if they did not sign such cards. In *Cream of the Crop*, 300 NLRB 914 (1990), the owner used the employee more than once to translate for him at group meetings he called, and she was identified as being available on a continuous basis to transmit employee complaints to him. In *La Famosa Foods*, 282 NLRB 316, 328–329 (1986), the employee communicated work directives to employees, in the absence of any Spanish-speaking supervisors. In *Enterprise Aggregates Corp.*, 271 NLRB 978 (1984), the employee was the daughter of the owner and worked in the corporate office. In *Ja-Wex Sportswear*, 260 NLRB 1229 (1982), the employee distributed literature and stated that she was doing so at the request of the respondent's president, who later confirmed this. In *NAB Construction Corp.*, 258 NLRB 670 (1981), the superintendent introduced the employee as his assistant and stated he would not override what the employee said, and the employee communicated reprimands to employees.

Another case finding a bilingual employee to be an apparent agent, *Great American Products*, 312 NLRB 962, 963 (1993), is also distinguishable. There, the employee was a leadman whom respondent had introduced as a supervisor and to whom employees were told to direct questions and problems concerning such matters as job assignments and requests for time off.

[39] GC Br. 51–52.

From the testimony of the General Counsel's witnesses and the entire record, I am convinced that employees, both Spanish speaking and in general, do not deem Larreynaga to "represent" the Company as a manager, supervisor, or spokesperson, or to be in charge of HR. Rather, they consider her a senior clerical employee and something of a helping hand.

Turning to Larreynaga's specific conduct surrounding the decertification campaign, at no time did Larreynaga say anything to employees she solicited that she was acting in any way as a company representative. Indeed, in her later conversation with Martinez, she indicated that she was in trouble with the Company, presumably on account of her solicitation activities. Similarly, even crediting both DeGraffenreid's and Figueroa's accounts, Larreynaga said nothing about her being connected with management. Indeed, in both, she spoke almost sub rosa about "the Company" or "they" wanting the Union out and told both of them not to repeat what she had stated.

Neither Riley nor any other supervisors or managers were present when she had any of the relevant conversations, and there is no evidence that any of them ever said anything to employees conveying condonation or approval of her conduct.

The only other alleged violations contend that the Respondent allowed B. DaCosta to solicit signatures on decertification petitions on work time and that DaCosta promised Figueroa a pay raise if he abandoned support for the Union. Even if found meritorious, they would not demonstrate that NECCO engaged in a pattern of anti-union conduct such that employees reasonably would have seen Larreynaga's conduct as reflecting management's desire to oust the Union. In this regard, there is no contention that the Respondent disciplined employees for any other kind of solicitation on worktime or took any action to prevent Figueroa from soliciting signatures opposed to the decertification.

In summary, I conclude that Larreynaga did not possess apparent authority, either in general or with regard to her conduct set out in the complaint, as amended at trial. Accordingly, I recommend that those allegations be dismissed.

DaCosta's Conduct

Clearly, DaCosta and other managers/supervisors had knowledge of the decertification petitions that his wife kept on the table in the laundry room during her workday. The issue, however, is whether he or other managers/supervisors had knowledge that employees signed the petitions either on their worktime or her worktime and took no action. In the absence of evidence that DaCosta or any other management or supervisors were ever present at any times when employees signed the decertification petitions, I cannot conclude that he or other managers/supervisors knew that B. DaCosta or any other employees engaged in decertification activity on work time. A fortiori, they could not be found to have permitted or condoned any such activity. See *Flying Foods*, 345 NLRB 101, 105 (2005);[40] *Gorges/Quick-To-Fix Foods*, 327 NLRB 635, 635 fn. 1 (1999).

[40] Then Member Liebman concurred in this aspect of the Board's Decision. 345 NLRB at 118.

Even if they had knowledge of the solicitation, the General Counsel has failed to establish that the Respondent enforced the rule against any other employees. *Flying Foods*, ibid; *Parkview Gardens Care Center,* 280 NLRB 47, 51 (1986). Indeed, the General Counsel does not aver disparate application of the policy.[41]

Narricot Industries, 353 NLRB 775 (2009), and *Placke Toyota, Inc.*, 215 NLRB 395 (1974), cited by the General Counsel,[42] are distinguishable, inasmuch as the individuals who maintained the decertification petitions in open areas were managers or supervisors who otherwise "actively participated in the decertification process." *Narricot Industries* at slip op. 1.

Accordingly, I cannot conclude that the Respondent assisted the decertification effort by conveying to employees that it authorized B. DaCosta's activities supporting it. I therefore recommend dismissal of this allegation.

DaCosta's Statement to Figueroa

DaCosta's statement was he could not pay Figueroa more because of the union contract, and that "It would be a different story if we didn't have a union" (emphasis added).

DaCosta used the verbiage "would" rather than "could" or "might," thus suggesting the certainty, not mere possibility, of financial benefit to Figueroa if the Union was ousted. This amounted to a unlawful promise of benefit if the Union was decertified. Even if DaCosta's statement had been more in the nature of a promise to consider giving Figueroa higher pay, it would have constituted an illicit promise of benefit. See *Shaw, Inc.*, 350 NLRB 354 (2007) (promise to look into the possibility of providing a better insurance plan).

The Respondent's brief (at 23) cites *Flexsteel Industries*, 311 NLRB 257 (1993), *Mantrose-Haeuser Co.*, 306 NLRB 377 (1992); and *Oxford Pickles*, 190 NLRB 109 (1971). Those cases are inapposite in that they involved pre-election situations where the employers accurately stated as a matter of law that, depending on what was later negotiated, employees could lose benefits if they chose union representation.

I have carefully considered whether this single violation should be held de minimis in light of my finding that the Respondent committed no other violations of the Act and the fact that Figueroa was the only employee out of approximately 375 who heard it. His status as chief steward can cut both ways as far as effect. On the one hand, it might make him less vulnerable as far as finding the statement objectively coercive; on the other, his withdrawal of support for the Union could have a greater potential impact on the decertification campaign than if he held no such position.

Worthy of note is *Heartshare Human Services of New York*, 339 NLRB 842, 849 (2003), in which Judge Raymond Green determined that one supervisor's threat of discharge or layoff to one employee was not de minimis. He suggested that the result might be different if the single instance in question was unlawful because the statement was that selecting the union was futile, constituted unlawful interrogation, or made a promise. The Board affirmed his finding of a violation but did not address this dictum. I find his distinction between threat and promise interesting but am unaware of any cases in which the Board has articulated it as a rationale.

Leaving the above distinction aside, other circumstances militate against finding the promise de minimis. DaCosta was a high-level company representative who, during an active campaign to decertify the Union, spontaneously interjected it in a conversation about Figueroa's performance. Further, I note that a dismissal based on de minimis normally requires that a charged party took steps on its own volition to remedy the violation, which did not occur here. See, e.g., *Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620, 620–622 (1973).

Accordingly, I conclude that the Respondent violated Section 8(a)(1) by promising Figueroa higher pay if the Union was decertified.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By promising an employee higher pay if the Union was decertified, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel requests (GC Br. at 57) that the Respondent be directed to post the notice to employees in Spanish, Portuguese, Cape Verdean Portuguese, and Haitian Creole, as well as in English. In the interest of ensuring that all employees can understand its contents, I will do so. See *Planned Building Services,* 347 NLRB 670, 680 fn. 2 (2006).

ORDER

The Respondent, New England Confectionary Company, Revere, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising employees higher pay or other better benefits if the Union is decertified.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility at Revere, Massachusetts, copies of the attached notice

[41] See GC Br. at 54 fn. 123.

[42] GC Br. at 53.

marked "Appendix"[43] in English, Spanish, Portuguese, Cape Verdean Portuguese, and Haitian Creole. Copies of the notice, on forms provided by the Regional Director for Region 1 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 4, 2009.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[43] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

Bakery, Confectionary, Tobacco Workers & Grain Millers International Union, Local 348 (the Union) is the certified bargaining representative of our full-time and regular part-time production employees.

WE WILL NOT promise employees higher pay or other better benefits if the Union is decertified.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

NEW ENGLAND CONFECTIONARY COMPANY